NO. 49475-2-II

COURT OF APPEALS
DIVISION II

IN THE STATE OF WASHINGTON

BRANDON FOSTER,

Appellant/Plaintiff,

v.

FRITO LAY, INC.

Respondent/Defendant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The employer offers the following as a brief introductory comment and summary of the employer's position. Claimant requests the Court of Appeals address the Superior Court's denial of his motion for summary judgment. The Superior Court denial of summary judgment cannot now be appealed because the denial was based upon a determination that material facts were disputed and needed to be resolved by the fact finder and the matter went to trial where a jury returned a verdict in favor of the employer.

Claimant next claims the Superior Court erred in denying his Motion for Directed Verdict in that the Pallet Jack Operator job analysis should not have been submitted to the jury. There was legally sufficient evidence to ask the jury to decide whether claimant was employable in the job of Pallet Jack Operator. The job analysis was properly submitted to the jury. Vocational Counselor Todd Martin testified pallet jack operation by itself is not commonly found in the labor market. A Pallet Jack Operator could also be required to drive. Claimant still remains able and does not appear to have trouble driving. Claimant has a driver's license and is capable of driving long distances. Claimant has the transferrable skills to perform the

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pallet jack job and both Dr. Shults and Dr. Baer agreed claimant could use a pallet jack.

Claimant also argues the Superior Court erred in denying claimant's Motion for Directed Verdict. He argues the Superior Court should have taken the case away from the jury and decided as a matter of law claimant was permanently totally disabled. Claimant cites to *Spring* as standing for the proposition that once claimant met his prima facie case, the burden of proof shifted to the employer to prove claimant was capable of performing and obtaining reasonably continuous gainful employment. *Spring* involved the 'odd lot' doctrine. There was legally sufficient evidence to ask the jury to decide whether claimant met his burden of proving he was so disabled that he was only fitted to perform odd jobs or special work not generally available, and if yes, whether the employer met its shifted burden. It's the employer's position claimant did not meet his initial burden. Mr. Martin testified claimant had the transferrable skills to perform a multitude of jobs. Specifically, Mr. Martin also concluded claimant would have the skills to perform ALL of the jobs identified in Exhibits 1 through 8, except Exhibit 5, Maintenance Mechanic. There is no evidence in the record to indicate that these are odd jobs or special work which is not generally available. The evidence establishes that these

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jobs are representative examples of light or sedentary work of a general nature generally available in the labor market. Mr. Martin also stated whether claimant could perform these jobs was a medical question. Dr. Baer and Dr. Shults both provided testimony as to claimant's ability to perform work. There was also evidence a jury could find helpful in assessing employability in claimant's inconsistent medical testing and lack of any impairment/disability when seen outside the courtroom on surveillance video. See Exhibit 9. It was the providence of the jury to decide how to weigh the evidence and testimony and make a practical and reasonable interpretation whether claimant could perform and obtain employment on a reasonably continuous basis in the general labor market based on the evidence as a whole.

Permanent total disability requires a study of the whole man as an individual and must be evaluated on a case-by-case basis. Substantial evidence supports the Superior Court's verdict that claimant was not a permanently totally disabled worker as of May 5, 2014. Mr. Martin's and Dr. Wojciechowski opinions fail because of claimant's lack of credibility, which was the foundation for the opinions of these experts. Claimant's lack of credibility is apparent with his test results for visual acuity, depth

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perception, visual field defect, intermittent exotropia/double vision, photophobia and his behavior observed on surveillance. See Exhibit 9.

The employer respectfully requests the Court of Appeals affirm the Superior Court's order and judgment. CP 59.

II. STATEMENT OF THE CASE

A. Procedural History

Claimant sustained an injury to his left eye on April 20, 2010 during the course of his employment with Frito Lay. Certified Appeal Board Record (CABR) (CP 5) at 65. On February 7, 2014, the Department of Labor and Industries (Department) rendered its final determination and closed the claim with time loss paid through January 29, 2014 and without award for permanent partial disability. CABR at 65. Claimant protested. CABR at 65. On May 5, 2014, the Department affirmed the February 7, 2014 Department order. CABR at 66. Claimant's attorney, Douglas Palmer, protested the May 5, 2014 Department order on May 16, 2014. CABR at 66. The protest was timely received at the Department, and forwarded to the Board of Industrial Insurance Appeals (Board) as a Direct Appeal. CABR at 66. On June 10, 2014, the Board granted the appeal and assigned it Docket No. 14 14529. CABR at 63.

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On July 10, 2014, the parties agreed to include the Jurisdictional History in the Board's record, which established the Board's jurisdiction to hear the appeal. CABR at 49. The parties attended a conference on July 28, 2014 to identify the issues and set the litigation schedule. CABR at 99. The issues before the Board included (1) whether the claimant's condition, proximately caused by his April 20, 2010 industrial injury, required further and proper necessary medical treatment, as provided by RCW 51.36.010; (2) whether the claimant was a totally and temporarily disabled worker, due to the residual impairment proximately caused by the industrial injury of April 20, 2010, during the period January 30, 2014 through May 5, 2014; (3) what degree of permanent partial disability best described the claimant's residual impairment, proximately caused by his April 20, 2010, industrial injury; and (4) whether the claimant was a totally and permanently disabled worker, due to the residual impairment proximately caused by the industrial injury of April 20, 2010, as of May 5, 2014, as contemplated by RCW 51.08.160. CABR at 99.

Hearings were held before Industrial Appeals Judge (IAJ) William Gilbert on November 6, 2014 and both sides presented evidence. At that time, the issue of medical treatment was formally withdrawn by claimant in spite of recommendations for additional treatment by all the medical

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experts who testified. CABR 11/6/14 CABR 11/6/14 Tr. at 37. Claimant presented the testimony of William Shults, MD; Bruce Wojciechowski, OD; and Jack Litman, PhD by perpetuation deposition. At the Board hearing, claimant presented his own testimony and the testimony of Todd Martin, VRC, CDMS. The employer presented the testimony of William Shults, MD; William Baer, MD; and Private Investigator (PI) James Ellis by perpetuation deposition. At the Board hearing, the employer presented the testimony of PI Russell Ernsberger, and PI Daniel Gusky.

IAJ Gilbert issued a Proposed Decision and Order (PD&O) on March 11, 2015. CABR 49-55. IAJ Gilbert made the following conclusions of law: (1) The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal; (2) Brandon Foster was not a temporarily totally disabled worker within the meaning of RCW 32.090 from January 30, 2014 through May 5, 2014; (3) Brandon Foster was not a permanently totally disabled worker within the meaning of RCW 51.08.160, as of May 5, 2014; (4) On May 5, 2014, Brandon Foster had a permanent partial disability within the meaning of RCW 51.32.080, proximately caused by the industrial injury; and (5) The Department order dated May 5, 2014, is incorrect and reversed. This matter is remanded to the Department to issue an order finding that the claimant was not entitled

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to time-loss compensation benefits from January 30, 2014, through May 5, 2014. Brandon Foster was not a permanently and totally disabled worker within the meaning of RCW 51.08.160, as of May 5, 2014. The self-insured employer is ordered to pay a permanent partial disability award equal to 20 percent of total bodily impairment, less prior awards, if any, and to close the claim. CABR at 55.

Claimant filed a Petition for Review on April 6, 2015. CABR at 28-42. The employer filed a Petition for Review on April 16, 2015. CABR at 10-25. Claimant filed an Amended Petition for Review on April 22, 2015. CABR at 5-8. On April 27, 2015, the Board issued an order denying both the employer's and claimant's petitions for review, and the PD&O became the final Decision and Order (D&O) of the Board. CABR at 1.

Claimant appealed the April 27, 2015 D&O to Clark County Superior Court, and the appeal was assigned 15-2-01211-1. The employer appealed the April 27, 2015 D&O to the Clark County Superior Court, and the appeal was assigned 15-2-01432-7. On August 28, 2015, Judge Derek Vanderwood granted the parties agreed order and joint motion to consolidate the appeals. CP 10.

On October 6, 2015, claimant's attorney filed a Note for Trial Setting and Demand for Twelve Person Jury. Claimant also filed a Motion for

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Summary Judgment. CP 27. The employer filed a response to claimant's Motion for Summary Judgment on November 19, 2015. CP 30. Claimant filed a reply brief on November 24, 2015. CP 31. The matter came on for hearing before the Honorable Gregory Gonzales on December 3, 2015 and both sides presented argument. RP 1- 21. Judge Gonzales verbally denied the motion on December 18, 2015. RP 21-22. On January 8, 2016, Judge Gonzales issued an order denying claimant's Motion for Summary Judgment as there were genuine material issues of fact. CP 36.

The parties subsequently stipulated and agreed that the employer's appeal could be dismissed. On March 25, 2016, an order and judgment was issued dismissing the employer's appeal with each party responsible for its own attorney fees, costs and no interest was assessed based on the employer's appeal. CP 37. Claimant submitted his trial brief on July 15, 2016. CP 41. The employer submitted its trial brief on July 18, 2016. CP 43.

The matter came on regularly for trial on the 18th, 19th, 20th, and 21st days of July, 2016, before Judge Gonzales. CP 59. The Plaintiff/Claimant, Brandon Foster, was represented by his attorneys, Lee Thomas and Douglas Palmer, the Defendant/Employer, Frito Lay, Inc., was represented by its attorney, Gary D. Keehn, of Keehn Kunkler, PLLC. CP 59.

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A jury was impaneled and sworn to try the case, and evidence in the form of the Certified Appeal Board Record was read to the jury. CP 59. Following the conclusion of the reading of the testimony contained in the Certified Appeal Board Record, claimant filed a motion for directed verdict. CP 57. The parties both presented argument on the claimant's motion for directed verdict before Judge Gonzalez on July 20, 2016 and Judge Gonzalez made verbal rulings. RP 27 – 71. On July 21, 2016, Judge Gonzalez granted in part and denied in part claimant's motion for directed verdict. CP 51. The Court concluded the Board was incorrect in deciding claimant had no physical restrictions caused by the industrial injury. CP 51. The Court concluded the Board was incorrect in deciding claimant was capable of performing the job of Maintenance Mechanic. CP 51. The Court ordered the jury would be informed claimant had a restriction related to his inability to obtain a commercial drivers' license and they were not to consider the jobs of OTR Bin Driver, Forklift Operator, and Maintenance Mechanic. CP 51. The Court further ordered that Exhibits 1, 3, and 5, which were the job analyses for OTR Bin Driver, Forklift Operator, and Maintenance Mechanic would not be published to the jury and would be excluded from deliberation. CP 51.

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On July 21, 2016, the Court instructed the jury and the jury retired to consider its verdict. Thereafter the jury returned its verdict. RP 81- 84. The jury found (1) the Board was correct in deciding the industrial injury of April 20, 2010 did not proximately cause claimant to be temporarily totally disabled between January 30, 2014 and May 5, 2014; (2) the Board was correct in deciding the industrial injury of April 20, 2010 did not cause claimant to be permanently totally disabled as of May 5, 2014; and (3) the Board was correct in deciding claimant had a permanent partial disability, proximately caused by the industrial injury, equal to 20% of total bodily impairment. CP 55. An order and judgment was signed by Judge Gonzalez. CP 59.

Claimant then filed an appeal with the Court of Appeals. This office received claimant's appellate brief on December 28, 2016.

B. Factual History

Claimant's date of birth is October 5, 1972. CABR 11/6/14 Tr. at 53. Claimant graduated from Lakeside High School; attended Lane Community College; and attended the Oregon Institute of Technology where he studied civil engineering. CABR 11/6/14 Tr. at 18. From 1991 to 1994 he worked as a laborer for the Klamath County Road Department. CABR 11/6/14 Tr. at 17-18. He worked for Pepsi from 1994 to 1995 as a

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loader-merchandiser and from 1995 to 2000 as a route sales driver. CABR 11/6/14 Tr. at 17. Claimant also worked for Foster Roofing Construction from 1999 to 2005. CABR 11/6/14 Tr. at 17. Claimant was hired at Frito Lay in May 2005. CABR 11/6/14 Tr. at 39.

As of April 20, 2010, claimant worked for Frito Lay as an over-the road (OTR) truck driver. CABR 11/6/14 Tr. at 39. On that date, claimant sustained an industrial injury to his left eye when he was unloading his truck in eastern Oregon and some dust or sand or grit blew into the eye during the unloading process. Shults 9/17/14 Dep. at 11. He felt as if something had gotten into the eye and he continued to unload his vehicle and then drove back to Vancouver the following day. Shults 9/17/14 Dep. at 12. He had persistent sensation that something was in his eye and he saw an optometrist on April 22, 2010. Shults 9/17/14 Dep. at 12. That optometrist removed a metallic foreign body from the left eye. Shults 9/17/14 Dep. at 12. The persistent foreign body sensation in the left eye continued and claimant saw Dr. Craig Thompson on April 23, 2010, who referred claimant to an ophthalmologist named Dr. Clayton. Shults 9/17/14 Dep. at 12.

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On April 27, 2010, Dr. Clayton noted there was still some metal embedded in the cornea, which she removed. Shults 9/17/14 Dep. at 13. Claimant followed up with Dr. Clayton again on May 13, 2010.

Claimant subsequently came under the care of optometrist Dr. Bruce Wojciechowski on June 9, 2010. Wojciechowski Dep. at 8. Claimant presented with complaints of headaches, double vision that was intermittent and periodic, difficulties with driving, and light sensitivity or photophobia. Dr. Wojciechowski referred claimant to a corneal specialist. Shults 9/17/14 Dep. at 14. Claimant was subsequently seen by a corneal specialist at OHSU. Shults 9/17/14 Dep. at 14.

Dr. Wojciechowski noted for the first time that claimant had a visual field defect in a report dated September 13, 2010. Shults 9/17/14 Dep. at 15.

Board certified ophthalmologist Dr. William Baer first performed an Independent Medical Examination (IME) on October 6, 2010. Baer Dep. at 6. Neuro-ophthalmologist Dr. William Shults first evaluated claimant on December 13, 2010. Shults 11/20/14 Dep. at 7. Dr. Shults report is dated January 3, 2011. Shults 11/20/14 Dep. at 7

On June 6, 2011, Dr. Reznick recommended prism glasses. Shults 9/17/14 Dep. at 44. If that failed, she recommended strabismus surgery.

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Shults 9/17/14 Dep. 44. Psychologist Dr. Jack Litman evaluated claimant for half an hour on August 12, 2011 and re-interviewed him on September 29, 2011 for an hour and 15 minutes.

PI James Ellis performed surveillance of the claimant on November 2, 2011 and November 4, 2011. Ellis Dep. at 6, 8. PI Daniel Gusky surveilled claimant on November 18, 2011. PI Ellis surveilled claimant again on November 19, 2011 and November 20, 2011. Ellis Dep. at 12, 14. Dr. Shults evaluated claimant again on August 13, 2012. Shults 11/20/14 Dep. at 4, 7, 8. Dr. Baer performed a second IME on claimant on November 13, 2013. Baer Dep. at 14. PI Russell Ernsberger surveilled claimant on August 12, 2014.

Claimant incorrectly states the surveillance videos are not part of the appellate record. The employer submitted its designation of exhibits on October 26, 2016 and the Superior Court acknowledged completion of the designation of exhibits on November 1, 2016. Please see Exhibit 9.

III. ARGUMENT

A. Standard of Review

The Superior Court's jurisdiction over matters arising under the Industrial Insurance Act is limited by the terms of the Act. RCW 51.04.010; RCW 51.52.110 and .115. Original jurisdiction over matters arising under

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the Industrial Insurance Act resides with the Department of Labor and Industries. *Lenk v. Dep't of Labor & Indus.*, 3 Wn.App. 977, 982, 478 P.2d 761 (1970); *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997) ("the Act provides that both the Board and the superior court serve a purely appellate function.")

The Superior Court is an appellate court with respect to appeals from the Board and is bound by the same constraints as apply to all appellate courts. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). Superior Court review of a Decision and Order of the Board of Industrial Insurance Appeals is de novo on the Certified Appeal Board Record. Review is limited to those issues encompassed by the appeal to the Board, or properly included in its proceedings, and the evidence presented to the Board. RCW 51.52.115; *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969) ("The trial court is not permitted to receive evidence or testimony other than, or in addition to, that offered before the Board or included in the record filed by the Board.").

"Appellate review is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings." *Young v. Dep't of Labor & Indus.*, 81 Wn.App. 123, 128,

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913 P.2d 402 (1996). "Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise." *Brown v. Superior Underwriters*, 30 Wn.App. 303, 306, 632 P.2d 887 (1980). "When a trial court bases its findings of fact on conflicting evidence and there is substantial evidence to support them, an appellate court will not substitute its judgment even though it might have resolved the factual dispute differently." *Id.* at 305-306.

B. Burden of Proof

Claimant had the burden of proof at each and every level of his appeal. Once claimant appealed to the Superior Court, he was responsible for meeting the burden of proof governing appeals to the Superior Court under RCW Title 51. RCW 51.52.115 states, in pertinent part:

> In **all** court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same.

RCW 51.52.115 (emphasis added). This presumption of correctness means that the Board's decision will be overturned only if:

> [T]he trier of fact finds from a fair preponderance of the evidence that such findings and decision of the board are incorrect. It must be a preponderance of the credible evidence. If the trier of fact finds the evidence to be equally balanced then the findings of the board must stand.

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Allison v. Dep't of Labor & Indus., 66 Wn.2d 263, 268, 401 P.2d 982 (1965). By appealing the Board's decision, claimant assumed the burden of producing "sufficient, substantial, facts, as distinguished from a mere scintilla of evidence" to overcome the presumption of correctness enjoyed by the Board's decision. *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 96, 286 P.2d 1038 (1955). Claimant did not meet this burden.

The employer respectfully requests the Court of Appeals affirm the Superior Court order and judgment.

C. The Superior Court denial of summary judgment cannot be appealed because the denial was based upon a determination that material facts were disputed and needed to be resolved by the fact finder

Summary judgment is appropriate when it is determined by "uncontroverted facts. . . that there are, as a matter of fact, no genuine issues." *Preston v. Duncan*, 55 Wn.2d 678, 682, 349 P.2d 605 (1960). See also CR 56 (c). The burden is upon the party moving for summary judgment to show that there is no issue of material fact. A material fact is defined "one upon which the outcome of the litigation depends, in whole or in part." *Barrie v. Hosts of America, Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). Moreover, "all reasonable inferences must be resolved against the moving party, and the motion should be granted only if reasonable

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people could reach but one conclusion." *Hash by Hash v. Children's Orthopedic Hosp. and Med. Ctr.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988). The burden is not shifted to the nonmoving party unless the party moving for summary judgment first meets its initial burden of showing there is no dispute as to any issue of material fact. *Hiatt v. Walker Chevrolet Co.,* 120 Wn.2d 57, 66, 837 P.2d 618 (1992).

Our courts have said, "'a summary judgment denial cannot be appealed following a trial if the denial was based upon a determination that material facts are disputed and must be resolved by the fact finder.'" *Kaplan v. Northwestern Mut. Life Ins. Co.,* 115 Wn.App. 791, 799, 65 P.3d 16 (2003) (quoting *Brothers v. Pub. Sch. Employees of Washington,* 88 Wash.App. 398, 409, 945 P.2d 208 (1997); *Johnson v. Rothstein*, 52 Wash.App. 303, 304, 759 P.2d 471 (1988)). In this case, the Superior court denial of summary judgment cannot be appealed because the denial was based upon a determination that material facts were disputed and needed to be resolved by the fact finder.

The order denying claimant's motion for summary judgment specifically stated, "IT IS HEREBY ORDERED Plaintiff's Motion for Summary Judgment is denied as there are genuine material issues of fact concerning claimant's credibility which is the foundation for the opinions of

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plaintiff's expert witnesses and plaintiff's ability to obtain and perform employment." CP 36. Claimant decided not to appeal the order and the matter went to trial and resulted in a jury verdict. Claimant cannot now appeal the denial of summary judgment.

D. Motion for Directed Verdict

Motions for directed verdict are governed by CR 50(a)(1) which states, in pertinent part:

> If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

A motion for judgment as a matter of law is appropriate when, "'viewing the evidence in the light most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to support a verdict for the nonmoving party.'" *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (quoting *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997)). In reviewing denial of a CR 50(a) motion for judgment as a matter of law, the Court of Appeals applies the same standard as the trial

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court, considering the evidence in the light most favorable to the nonmoving party. *Id.* "If the evidence offers room for a difference of opinion on the issue of total disability, resulting from the injury, the case must be submitted to the jury." *Fochtman v. Dep't of Labor & Indus,* 7 Wn. App. 286, 289, 499 P.2d 255 (1972).

1. **There was legally sufficient evidence to ask the jury to decide whether claimant could perform the job of Pallet Jack Operator, and the job analysis was properly submitted to the jury**

Claimant argues the Pallet Jack Operator Job should not have been submitted to the jury because "Mr. Martin testified the Pallet Jack Operator position does not exist in Mr. Foster's labor market." *Appellant Brief at 25.* Claimant misstates Mr. Martin's testimony. In fact, Mr. Martin actually testified pallet jack operation is "not something that's commonly found in the labor market where that's all the individual is doing." CABR 11/6/14 Tr. at 29. Working as a pallet jack operator could also require claimant to drive. CABR 11/6/14 Tr. at 29.

The Superior Court determined claimant was unable to work as an OTR Bin Driver because claimant is unable to obtain his CDL. You must have a CDL to operate:

- Any single vehicle with a gross vehicle weight rating of 26,001 pounds or more.

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- A combination vehicle with a gross combination weight rating of 26,001 or more pounds, provided the gross combination weight rating of the vehicle(s) being towed is in excess of 10,000 pounds.
- A vehicle designed to transport 16 or more passengers (including the driver).
- All school buses regardless of weight or size.

See RCW 46.25.010. The Pallet Jack Operator position does not require a CDL. Exhibit 8. Claimant still remains able and does not appear to have trouble driving. He has a current driver's license with no restrictions. CABR 11/6/14 Tr. at 78. Surveillance shows claimant is able to drive long distances. See Exhibit 9. On one day, claimant drove his Toyota Pickup from Chehalis to Olympia to Portland and on another day he was able to drive his Toyota Pickup from Portland to Vancouver to Sandy.

Mr. Martin determined claimant has the transferrable skills to perform the job of Pallet Jack Operator. CABR 11/6/14 Tr. at 28. Mr. Martin agreed it was a medical question whether claimant would be employable to drive in a noncommercial setting. CABR 11/6/14 Tr. at 30. Dr. Shults testified claimant could use a pallet jack. Shults 11/20/14 Dep. at 39. Dr. Baer also agreed claimant could perform the job of Pallet Jack Operator. Baer Dep. at 28. Therefore, there was legally sufficient evidence to ask the jury to

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decide whether claimant could perform the job of Pallet Jack Operator, and the job analysis was properly submitted to the jury.

2. There was legally sufficient evidence to ask the jury to decide whether claimant proved he was so disabled that he was only fitted to perform odd jobs or special work not generally available, and if yes, whether the employer met its shifted burden.

Claimant argues the Superior Court erred in denying claimant's Motion for Directed Verdict. He argues the Superior Court should have taken the case away from the jury and decided as a matter of law claimant was permanently totally disabled. Claimant cites to *Spring* as standing for the proposition that once claimant met his prima facie case, the burden of proof shifted to the employer to prove claimant was capable of performing and obtaining reasonably continuous gainful employment. *Spring* involved the 'odd lot' doctrine. The 'odd' lot doctrine was first enunciated in *Kuhnle,* "[i]f an accident leaves the workman in such a condition that he can no longer follow his previous occupation or any similar occupation, and is fitted only to perform 'odd jobs' or special work not generally available, the burden is on the department to show there is special work that he can in fact obtain." *Kuhnle v. Dep't of Labor & Indus.*, 12 Wn. 2d 191, 198, 120 P.2d 1003 (1942.) The Court in *Kuhnle* quoted approvingly from *White v.*

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Tennessee Consolidated Coal Co., 162 Tenn. 380, 385, 36 S.W2d 902, 904 as follows:

> "If the accident has left the workman so injured that he is incapable of becoming an ordinary workman of average capacity in any well-known branch of the labor market – if, in other words, the capacities for work left him fit only for special uses, and do not, so to speak, make his powers of labor a merchantable article in some of the well-known lines of the labor market – I think it is incumbent on the employer to show that such special employment can, in fact, be obtained by him. If I might be allowed to use such an undignified phrase, I should say that if the accident leaves the workman's labor in the position of an 'odd lot' in the labor market, the employer must show that customer can be found who will take it."

Id. at 199.

In *Spring,* the Court concluded, "Spring met the burden of proving that he could not obtain and maintain employment of a general light and/or sedentary nature. The burden then shifted to the employer to prove that odd lot or special work of a nongeneral nature was available to Spring." *Spring v. Dep't of Labor & Indus.,* 96 Wn. 2d 914, 919, 640 P.2d 1 (1982). In other words, before the burden shifts to the employer, the worker first needs to prove he is "incapable of performing light or sedentary work of a general nature." *Id.*

In claimant's appeal, there was legally sufficient evidence to ask the jury to decide whether claimant proved he was so disabled that he was

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only fitted to perform odd jobs or special work not generally available, and if yes, whether the employer met its shifted burden. It's the employer's position claimant did not meet his initial burden. Mr. Martin determined claimant, "would possess the transferrable skills to work as a truck driver, auto courier. He would possess skills to work in the construction industry such as a roofer or carpenter. He would also possess transferable skills to be a route sales driver, a loader-unloader in a warehouse environment. He would qualify for work as a merchandiser." CABR 11/6/14 Tr. at 18. Specifically, Mr. Martin also concluded claimant would have the transferrable skills to perform ALL of the jobs identified in Exhibits 1 through 8, except Exhibit 5, Maintenance Mechanic. CABR 11/6/14 Tr. at 34.

There is nothing in the record to indicate that these are odd jobs or special work which is not generally available. Other than Mr. Martin's qualified testimony on the Pallet Operator Job as outlined previously, there is nothing in the record to indicate that these jobs are not generally available in the labor market. Indeed, Mr. Martin evaluated claimant's work history and educational background in determining the claimant had the transferable skills to perform these jobs. As such, the evidence

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establishes these jobs are representative examples of light or sedentary work of a general nature generally available in the labor market.

Mr. Martin also stated whether claimant could perform these jobs was a medical question:

Q: So, getting back to these job analysis. Is there any other reason outside of his left eye that would prevent him from doing those jobs?

A: Well, in my interview with him he noted that he tends to develop headaches when he has to close his left eye for long periods of time for the right eye compensating. And that he has to be able to lie down on occasion for upwards of an hour, or so, to help the headaches go away and get the eyes to calm down. That would be a factor that, in my opinion, would bring into question ability to maintain full time employment.

Q: In reference to that, that, once again, gets back to the severity of his left eye condition, does it not?

A: That does, correct.

Q: So, I guess, in looking at all these jobs, it's really a medical question as to whether or not he can perform?

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A: That is correct.

CABR 11/6/14 Tr. at 34-35. Dr. Baer answered that medical question. Dr. Baer opined claimant would not likely be able to obtain his commercial driver's license in the absence of the recommended surgery. Baer Dep. at 25. However, he opined even if we consider claimant's intermittent exotropia, claimant could perform the job of Construction Laborer (Exhibit 2); Bulk Order Picker Restocker (Exhibit 4); Maintenance Mechanic (Exhibit 5); Material Handler Belt Picker (Exhibit 6); Materials Handler Belt Loader (Exhibit 7); and Pallet Jack Order Filler (Exhibit 8). Of these, the jury was only unable to consider Maintenance Mechanic, Exhibit 5. CP 51. Similarly, Dr. Shults states "I believe on a more probable than not basis, he would be able to return to his previous occupation as a long haul truck driver" referring to the likely outcome if claimant accepted the surgery. Shults 11/20/14 Dep. at 19. Dr. Shults also opined claimant would have been able to return to the jobs he had held prior to that, such as doing warehouse work (site specific) and forklift driving. Shults 11/20/14 Dep. at 20, 39. As noted previously, Dr. Shults testified claimant could use a pallet jack. Shults 11/20/14 Dep. at 39.

There is also evidence of general employability in claimant's inconsistent medical testing and lack of any impairment/disability when

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seen outside the courtroom, explained in further detail below. See also Exhibit 9. Based on this evidence, a reasonable juror could call into question claimant's complaints and ability to perform and obtain employment on a reasonably continuous basis. It also calls into question the opinions of Dr. Wojciechowski and Mr. Martin's as it undermines the foundation for their opinions.

There was legally sufficient evidence to deny claimant's Motion for Directed Verdict and the matter was properly submitted to the jury. It was the providence of the jury to decide how to weigh the evidence and testimony and make a practical and reasonable interpretation whether claimant could perform and obtain employment on a reasonably continuous basis in the general labor market. See jury instruction number 15 on the definition of total permanent disability and jury instruction number 16 on the odd lot doctrine. CP 54.

E. Permanent total disability requires a study of the whole man as an individual. A reasonable juror could conclude claimant is capable of performing and obtaining gainful employment on a reasonably continuous basis

Claimant cites to *Fochtman* for the proposition that the standard of proof for permanent total disability is whether the injured worker is capable of performing and obtaining reasonably continuous and gainful employment

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in light of his claim-related restrictions, pre-existing conditions, skills, education experience, etc. *Appellant Brief at 19.* Claimant misstates *Fochtman.* Permanent total disability requires a study of the whole man as an individual and must be evaluated on a case-by-case basis.

Fochtman was a matter of first impression in Washington on the issue of whether the opinion of a qualified vocational consultant together with a personal evaluation and testing of the claimant was sufficient to support a finding of permanent total disability. *Fochtman v. Dep't of Labor & Indus,* 7 Wn. App. at 288. The *Fochtman* court noted in its analysis, "total disability is inability, as the result of a work-connected injury, to perform or obtain work suitable to the workman's qualifications" and "requires a study of the whole man as an individual" *Id.* at 294 – 295 The *Fochtman* court found vocational testimony to be relevant and admissible in establishing total disability. *Id.* at 295.

In 1989, the Washington Supreme Court Committee on Jury Instructions added the phrase "or obtain" to WPI 155.07. *Leeper v. Dep't of Labor & Indus.,* 123 Wn.2d 803, 806, 872 P.2d 507 (1994). The previous edition on the instruction defined total disability as a medical condition that made a worker "'unable to perform a gainful occupation.'" *Id.* at 806 (quoting 6 Wash.Prac. WPI 155.07). The third edition defined total

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disability as a medical condition that made a worker "unable to perform or obtain a gainful occupation." *Id.* (quoting WPI 155.07 (3d. ed. 1989)). The Department in *Leeper* argued the revision to WPI 155.07 was inappropriate and misstated the law. *Id.* at 806. As such, the issue in *Leeper* was "whether evidence of a worker's inability to obtain employment is relevant to determining if an injury has left a worker permanently totally disabled." *Id.* at 805. In concluding the third edition of WPI 155.07 was a correct statement of law, the *Leeper* court noted, "the court in Fochtman accepted proof of the inability to obtain employment, caused by a workplace injury, as relevant evidence of total disability." *Id.* at 813. Similarly, the *Leeper* court agreed permanent total disability is a multi-factor inquiry, taking into consideration a "study of the whole man as an individual" *Id.* The *Leeper* court stated permanent total disability is a question of fact, which "require the trier of fact to judge in each case whether a particular individual is totally disabled, especially where medical evidence of the injured worker's ability to perform may conflict with vocational evidence of the worker's inability to obtain work because of the workplace injury." *Id.* at 818.

In other words, vocational testimony or testimony regarding a person's ability to obtain employment, while relevant and admissible

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evidence, **is only one factor** to be taken into consideration. If the claimant proves the injury caused an inability to obtain work, then the failure to obtain work is relevant evidence of total disability but not dispositive. It is for the jury to weigh and evaluate the evidence. The trier of fact is not bound by the opinions of the vocational counselor when the foundation of the vocational counselor's testimony is substantially flawed.

Claimant engages in an extensive discussion of RCW 51.32.095 in support of his proposition that vocational evidence is required. However, this statute governs vocational rehabilitation services before the Department. The statute contains criteria utilized by vocational counselors when assessing what, if any, vocational services should be recommended to the director or his designee. The employer submits this statute does not require a vocational counselor testify at Board hearing. The jury was properly instructed on the definition of total permanent disability.

F. Substantial evidence supports the Superior Court's verdict that claimant was not a permanently totally disabled worker as of May 5, 2014

Substantial evidence supports the Superior Court's verdict that claimant was not a permanently totally disabled worker as of May 5, 2014. Mr. Martin's and Dr. Wojciechowski opinions fail because of claimant's lack of credibility, which was the foundation for the opinions of these

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experts. WPI 2.10 instructs the jury in determining the credibility and weight to give to expert testimony, and instructs "you may also consider the reasons given for the opinion and the sources of his or her information." Although the opinions of the attending medical provider are entitled special consideration, those opinions may be disregarded or overcome by other evidence. *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 45, 395 P.2d 633 (1964). The law is clear, testifying doctors must have a factual basis for his or her conclusions. If material facts are missing it can be fatal to that conclusion. *Sayler v. Dep't of Labor & Indus.*, 69 Wn.2d 893, 896, 421 P.2d 362 (1966). Similarly, an expert opinion is without probative value if it based upon incomplete or inaccurate medical history. *Id.*

Dr. Wojciechowski's opinions were challenged at the Board. As the Board stated:

> It can be inferred that Mr. Foster's lack of complete candor in relating his symptoms affected the data on which Dr. Wojciechowski's diagnoses and findings were based. Therefore, Wojciechowski's opinions have been completely undercut with respect to the nature and seriousness of Mr. Foster's problems. And also their effect on his ability to work.

CABR at 53.

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Mr. Martin admitted his opinion with respect to claimant's ability to obtain and perform reasonably continuous gainful employment is predicated on accepting several assumptions:

> Q: Do you have an opinion as to whether or not [Mr. Foster] is able to obtain and perform reasonably continuous gainful employment on a full time basis as of May 5, 2014?
>
> A: Assuming the difficulties of diplopia and exotropia, and assuming the opinions of Dr. Bruce [Wojciechowski], I would say, no, he would not be able to do any type of gainful employment absent retraining.

CABR 11/6/14 Tr. at 30. As observed by the Board,

> Mr. Martin's vocational testimony and its probative value are necessarily predicated on accepting the opinions of Dr. Wojciechowski and their accuracy. Mr. Martin testified that he considered the opinions of Dr. Shults and Dr. Baer but he seemed to give no weight at all to their concerns regarding possible misreporting by Mr. Foster. For these reasons, I give little to no weight to Mr. Martin's testimony regarding Mr. Foster's restrictions as they applied to the job analyses on which he relied on forming his opinion that Mr. Foster was not employable.

Claimant's lack of credibility is apparent with his test results for visual acuity, depth perception, visual field defect, intermittent

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exotropia/double vision, photophobia and his behavior observed on surveillance.

Claimant's credibility: Visual Acuity

Claimant's visual acuity is better than he professes. Visual acuity is a subjective test. Shults 9/17/14 Dep. 23. On May 13, 2010, Dr. Clayton was able to correct claimant's visual acuity in the left eye to a level of 20/20+1. 20/20 is considered to be perfect vision. *See* Baer Dep. at 9. Despite the fact that claimant's visual acuity was nearly perfect in May 2010, his visual acuity since that time has been unpredictable and unreliable.

In October 2010, claimant's left eye visual acuity was 20/80. Baer Dep. at 9. When specifically asked if claimant had a true visual acuity loss of 20/80, claimant stated "no." Baer Dep. at 13. Dr. Baer felt the testing of visual acuity was "inconsistent." Baer Dep. at 13. Dr. Baer did not think claimant had the corneal capacity substantial enough to cause the limitation of acuity. Baer Dep. at 12.

In December 13, 2010, claimant's left eye visual acuity was 20/60-2+2. Shults 9/17/14 Dep. at 20. However, the left eye exhibited a small superficial opacity, which was mild and small and not in an area that Dr. Shults thought would produce any major problems with his visual acuity.

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Shults 9/17/14 Dep. at 27. The rapid deterioration of claimant's visual acuity was unusual given the nature of his accident. Shults 9/17/14 Dep. at 21. As such, Dr. Shults also conducted the cross cylinder test because it can help determine whether the patient is telling the truth. Shults 9/17/14 Dep. at 21, 22. The cross cylinder test is a test in which

> I place glasses in front of the patient which initially have the equivalent of window glass in front of each eye and I ask the patient to read the chart with those glasses on. I then alter the glasses by turning some device which causes the patient's vision to become blurred in both eyes. Then I ask the patient to continue to look at a row of letters and I choose the size of the letters I want him to look at and isolate those so in this case, I isolated the 20/30 line...when you do that with both eyes open, patients cannot tell which eye you are testing.

Shults 9/17/14 Dep. at 21-22. The cross cylinder test revealed claimant could see at least 20/30 when claimant claimed to only be able to see 20/60. Shults 9/17/14 Dep. at 23. His visual acuity could have been better then 20/30. Shults 9/17/14 Dep. at 22. Dr. Shults did not test near visual acuity because he already established he wasn't getting accurate information from the claimant at that point. Shults 9/17/14 Dep. at 23.

On the date of his second examination, the cross cylinder test revealed claimant was able to read at a level of 20/25-2. . Shults, 9/17/14 Dep. at 5 A level of 20/25 is good visual function. It's one line less than 20/20. You can pretty much do everything you need to do with a visual acuity of that

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magnitude. Shults 11/20/14 Dep. at 13. So again, the cross cylinder test established that claimant's visual acuity was much better than he was allowing us to appreciate. Shults 9/17/14 Dep. at 59. Using both eyes together, claimant read at a level of 20/50, which was unusual. Shults 9/17/14 Dep. at 59. Dr. Shults would have anticipated him to see 20/20, maybe 20/25 at worst. Shults 9/17/14 Dep. at 59. Dr. Shults testified

> I think the results of the cross cylinder test strongly apply that the patient's level of visual function is better than he was allowing us to measure when he knew we were measuring visual function in his left eye. **When he didn't know that we were measuring visual function in the left eye, his visual function improved to the 20/25 level.** That difference is explained on the basis of what I would call **functional visual loss**. Functional visual loss is divided into two categories, hysterical – or emotionally-based visual impairment and malingering, which is intentional feigning for gain.

Shults 11/20/14 Dep. at 9-10 (emphasis added). The record demonstrates claimant does not have a hysterical or emotionally-based vision loss.

In November 2013, claimant's visual acuity was even worse, having dropped to 20/200. Baer Dep. at 16. Dr. Baer thought claimant's alleged decrease in visual acuity was suspect and that it would "not make sense. If two years before 2010 when I saw him his visual acuity was 20/80 and there's been . . . continued healing, there's no reason for his

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visual acuity to decrease. If anything, it should at least stay the same, if not improve. " Baer Dep. at 21.

Claimant's visual acuity is 20/25 or better. For a thorough explanation, see Shults 11/20/14 Dep. at 8-10.

Claimant's credibility: Visual Field Defect

Claimant lacks credibility based on objective measures used to test visual field defect. To have the limited visual field abnormality which he professed, claimant has to have a relative afferent pupillary defect. Shults 9/17/14 Dep. at 44. An afferent pupillary defect signifies that the brain is getting less signal from one eye than the other. Baer Dep. at 10. Pupillary reactions are objective. Shults 9/17/14 Dep. at 24.

Dr. Baer did not find an afferent pupillary defect in October 2010 or November 2013. Baer Dep. at 10, 17. Dr. Shults did not find an afferent pupillary defect in December 2010 or August 2012. Shults 9/17/14 Dep. at 27, 60.

Per Dr. Shults

> His visual field in the left eye is full, as I found on the time or occasion of my first evaluation. That is based on the fact that he doesn't have an afferent pupillary defect, he doesn't have an abnormality of his visual evoked potential or his electro retinal gram or any change in his ocular coherence

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> tomography, all of which you would expect him to exhibit were his visual field defect organic in nature. **The absence of these corroborative findings demand a non-organic explanation for his professed visual field loss in his left eye.**

Shults 11/20/14 Dep. at 12- 13. (emphasis added)

Dr. Wojciechowski initially diagnosed a visual field defect but later changed his opinion when confronted with contrary opinions. He stated that claimant's alleged visual field loss "is his brain's attempt to shut down visual images." Wojciechowski Dep. at 64- 65. Dr. Wojciechowski's "theory" was presented to Dr. Shults who opined "So, in his proposing such a mechanism, he is creating a new neuro physiologic abnormality when one **doesn't exist** and to the best of my knowledge, has never been written about in a peer review journal. So, I just simply think that it can't be so." (emphasis added). This nonscientific theory is from the same optometrist who also found claimant to have a significant loss of visual acuity.

It is the employer's position claimant does not have a visual field loss. This, like his visual acuity, is an attempt to gain monetary rewards by falsifying and/or exaggerating complaints and symptoms.

Claimant's credibility: Depth perception

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Claimant's assertion that he lacks good depth perception is suspect. At the time of his first evaluation, Dr. Baer tested his stereopsis, which is a subjective test of true depth perception. Baer Dep. at 11. In October 2010, claimant could only identify the first set of the nine test objects. Baer Dep. at 11. In December 2010, claimant could correctly identify five of nine circles. Shults 9/17/14 Dep. at 26. Dr. Shults testified he thought claimant would have "more of an impairment of depth perception than five out nine circles when he was manifestly exotropic." Shults 9/17/14 Dep. at 40-41. However, there are patients who can volitionally create abnormal eye movements. Shults 9/17/14 Dep. 24.

At the time of Dr. Baer's second evaluation in November 2013, claimant couldn't recognize true depth perception or stereopsis, at all. Baer Dep. at 18. However, claimant could recognize true depth perception or stereopsis at other exams around this time. Baer Dep. at 18.

Like other subjective eye tests performed, claimant's test findings were inconsistent and varied from exam to exam.

Claimant's credibility: Photophobia

Claimant's complaints of photophobia cannot be believed or trusted. Photophobia is "an increase in sensitivity to light, in which exposure to varying degrees of light produces discomfort." Shults

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11/20/14 Dep. at 15. In his November 2014 deposition, Dr. Shults commented on the photophobia:

> I think that given the nature of the injury he sustained, I would not have any question about his reporting photophobia to the initial optometrist he saw or to Dr. Clayton who did some further removal of the superficial material from the cornea. I would have expected him to have some degree of photophobia early on. As his corneal epithelium healed and any kind of associated mild anterior segment inflammation disappeared, I would have expected his photophobia to diminish. That he has photophobia now, I can't deny. **All I can say is I don't have an organic basis for it given his exam findings currently**. Shults 11/20/14 Dep. at 16. (emphasis added).

According to Dr. Wojciechowski, photophobia was caused by the scattering of light from the corneal scar. Wojciechowski Dep. at 45. However, the scar is not significant enough to cause the photophobia. In fact, the corneal scar is estimated to be less than half-a-millimeter. Baer Dep. at 11-12; Shults 11/20/14 Dep. at 14. Dr. Baer stated the scar in claimant's eye should not cause a refraction of light. Baer Dep. at 20. On the date of Dr. Baer's second examination, the corneal scar appeared improved and less noticeable. Baer Dep. at 18-19. This is consistent with

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the testimony of Dr. Shults that there should be improvement in the photophobia and not a worsening. Shults 11/20/14 Dep. at 16.

Dr. Baer went on to explain

> A. In general, true photophobia, true light sensitivity is caused by internal inflammation in the eye. No one, myself or no one else has ever discovered it. I did comment at the second examination that he did not exhibit signs of photophobia during the examination when he was exposed to fairly bright lights, I did not see aversive behavior.

Baer Dep. at 23.

The testimony of the investigators and the video surveillance admitted into evidence shows claimant only taking precautions when going to an eye doctor appointment and otherwise does not show claimant taking any precautions such as a wide brimmed hat or dark glasses. Exhibit 9.

Dr. Wojciechowski assigned significant restrictions to the complaints of photophobia. It is the employer's position claimant doesn't have the problem, and the jury correctly rejected the opinions and the restrictions assigned by Dr. Wojciechowski.

Claimant's Credibility: Intermittent Exotropia

Claimant argues he is not able to perform and obtain gainful employment on a reasonably continuous basis because of his double

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vision. Claimant was experiencing binocular diplopia, or double vision, as a result of intermittent exotropia. Shults 11/20/14 Dep. at 23. Exotropia is "misalignment of the eyes." Shults 11/20/14 Dep. at 23. Exotropia also causes impairment of depth perception. Shults 9/17/14 Dep. at 40. This allegedly causes the claimant emotional difficulties. Yet, the claimant has not taken advantage of the strabismus surgery that would correct the problem and claimant's psychologist testified to a call to claimant's girlfriend/friend where she stated, "she has known him for the past four or five years and she claims he is not psychologically different throughout the time she has known him." Litman Dep. at 39.

As noted by the IAJ, the surveillance raises the inference that claimant's double vision is self-correctable to allow safe driving." CABR at 53. If a person sees double, they would have a great deal of difficulty ambulating or driving a car. Wojciechowski 10/24/14 Dep. at 58. However despite the double vision, claimant was able drive his Toyota Pickup from Chehalis to Olympia to Portland on November 2, 2011. Ellis Dep. at 7-8. On November 4, 2011, claimant drove his Toyota Pickup from Portland to Vancouver to Sandy. Exhibit 9. Notably, on November 19, 2016, claimant loaded six long boards, which were approximately 15 feet long, and two shorter boards into the back of his pickup. Ellis Dep. at 13. He climbed up

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and down from the back of the pickup as he secured the load with the straps. Ellis Dep. at 13. Claimant did not appear to lose his balance, act dizzy, or have a hard time maneuvering. Ellis Dep. at 13. Claimant then returned to Koi Pond Sellers and unloaded the boards there. Ellis Dep. at 14. On November 20, 2011, claimant loaded four large rolls of insulation into the back of his pickup and a few shorter boards. Claimant was followed to Koi Pond Sellers where he unloaded the rolls of insulation. At no time on November 20th did claimant ever appear to lose his balance or sway back and forth and he did not appear to have problems maneuvering. Ellis Dep. at 17.

Binocular double vision disappears when either eye is covered. Shults 9/17/14 Dep. at 16-17. However, claimant was not observed walking with either his left or right eye closed when he was surveilled by Private Investigator Russell Ernsberger on August 12, 2014. CABR 11/6/14 Tr. at 103.

Claimant exaggerated his visual acuity complaints, photophobia complaints, vision field loss complaints, and the evidence as a whole shows he is likely able to control any double vision he may have. CABR at 6.

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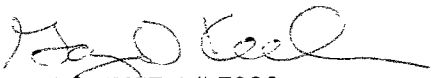
IV. CONCLUSION

Substantial evidence supports the verdict made by the Superior Court jury. Claimant was not a permanently totally disabled worker as of May 5, 2014. Based on the foregoing, the employer respectfully requests the Court of Appeals affirm the Superior Court's order and judgment. CP 59.

RESPECTFULLY SUBMITTED THIS 27th day of January, 2017

Keehn Kunkler PLLC
Attorneys for Frito Lay, Inc.

By: 
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NO. 49475-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

Brandon S. Foster, Appellant, v. Frito-Lay, Inc., Respondent.	CERTIFICATE OF SERVICE (Respondent, Frito-Lay, Inc.'s, Brief and Cover Letter)

I, UnJu Kim, hereby certify under penalty of perjury pursuant to the laws of the State of Washington, e-mailed the following documents:

- Respondent's, Frito-Lay, Inc.'s, Brief
- Certificate of Service to Frito-Lay, Inc.'s Brief
- Frito-Lay's cover letter for its Brief in the Court of Appeals

On January 27, 2017, to the following, postage prepaid US Mail and or as otherwise noted:

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GARY D. KEEHN
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January 27, 2017 - Amended

Clerk of the Court via JIS-Link
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

Re: Brandon S. Foster v. Frito-Lay, Inc.
Clark County Superior Court Cause No. 15-2-01211-1
Court of Appeals, Division II, Docket No. 49475-2-II

Dear Clerk of the Court:

Enclosed please find the Respondent's, Frito-Lay, Inc., Brief and Certificate of Service for filing in reference to the above captioned matter.

Thank you for your courtesies. Please do not hesitate to contact this office if you have any questions.

Very truly yours,

UnJu Kim
Legal Assistant to
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Enclosures
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Sedgwick CMS
Frito-Lay, Inc.

NO. 49475-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

Brandon S. Foster,	)	AMENDED
	)	CERTIFICATE OF SERVICE
	)	AND COVER LETTER FOR
Appellant,	)	RESPONDENT'S BRIEF
v.	)	
	)	
Frito-Lay, Inc.,	)	
	)	
Respondent.	)	

I, UnJu Kim, hereby certify under penalty of perjury pursuant to the laws of the State of Washington, electronically filed via JIS-Link the following documents:

- Respondent's, Frito-Lay, Inc.'s, Brief
- Certificate of Service to Frito-Lay, Inc.'s Brief
- Frito-Lay's cover letter for its Brief in the Court of Appeals
- Amended Certificate of Service and Cover letter for Brief

On January 27, 2017, to the following, postage prepaid US Mail and or as otherwise noted:

Court of Appeals, Division II, via JIS-Link

Copies to:

Douglas Palmer, Attorney via e-mail to dpalmer@busicklaw.com
And via U.S. Mail to
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KEEHN KUNKLER PLLC

January 27, 2017 - 2:47 PM

Transmittal Letter

Document Uploaded: 3-494752-Respondents Amended Cover Letter and Certificate of Service for Brief.pdf

Case Name: Brandon Foster v. Frito-Lay, Inc.

Court of Appeals Case Number: 49475-2

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

■ Other: Amended Cover Letter and Certificate of Service for Respondent's Brief

Comments:

Amended Cover Letter and Certificate of Service to reflect change of filing Respondent's Brief from email to electronically via JIS-Link

Sender Name: Unju Kim - Email: ukim@keehnkunkler.com

A copy of this document has been emailed to the following addresses:

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